A

DAUD ARSHAD & ORS v. FELCRA BHD

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
NALLINI PATHMANATHAN JCA
SURAYA OTHMAN JCA
B [CIVIL APPEAL NO: J-02(NCVC)(W)-1304-07-2016]
28 DECEMBER 2018

CIVIL PROCEDURE: *Trial – Proceedings – Disposal of case on point of law – Questions posed to court for determination – Trial proceeded to advanced stage –*
C *Whether application may be made before, during or after trial – Whether application made in bad faith – Whether entire matter could be disposed of and parties spared from rigmarole of trial process – Whether application resulted in substantial saving of time and expenditure – Whether claim involved disputed facts – Whether suit barred by limitation – Doctrine of estoppel – Whether applicable*
D *– Dayapi Holdings Sdn Bhd & Anor v. Arab Malaysian Finance Berhad & Anor – Rules of Court 2012, O. 33 rr. 2 & 5*

The appellants ('the plaintiffs') were former participants/settlers of a scheme, Rancangan Felcra Sg Ara. They commenced a suit against Felcra Berhad ('the defendant') challenging in essence, the profit and loss accounts of the
E defendant and the distribution of dividends to the plaintiffs. The plaintiffs sought, *inter alia*, the accounts and inquiries, inspection of the defendant's financial records and damages to be assessed. The case proceeded to full trial. After the plaintiffs closed their case and after the first witness for the defendant completed his testimony, the defendant filed an application
F (encl. 68) pursuant to O. 33 r. 2 and r. 5 of the Rules of Court 2012 ('ROC') for the determination of whether the plaintiffs' claim was time barred and whether the plaintiffs were estopped from filing the suit. The High Court Judge ('HCJ') found that the plaintiffs had filed the instant suit more than seven years after the cause of action had accrued and that the plaintiffs were
G estopped from challenging the accounts of the defendant. Hence, the HCJ dismissed the plaintiffs' claim. Aggrieved, the plaintiffs appealed to this court. The plaintiffs submitted that (i) the application by the defendant was made in bad faith as there was inordinate delay and that the defendant wanted to avoid cross-examination of its witnesses; (ii) the defendant had failed to
H apply for an order under r. 2 first before seeking the court's directions as to the manner in which the question or issue was to be stated; (iii) the defendant had failed to show that the application would result in a substantial saving of time and expenditure; (iv) O. 33 r. 2 of the ROC could not be resorted to as the plaintiffs' claim involved disputed facts; and (v) the HCJ had erred in failing to consider that the plaintiffs' cause of action was not based purely
I on the veracity of the defendant's financial accounts but also on fraud and on doctrine of legitimate expectation.

Held (dismissing appeal)
Per Tengku Maimun Tuan Mat JCA delivering the judgment of the court:

(1) The decision of the HCJ was in accord with the provisions of O. 33 r. 2 of the ROC which expressly states that the application may be made either before, at or after the trial. Despite the fact that in the instant case the trial had proceeded at such an advanced stage, with the plaintiffs' witnesses having completed their testimony and the defendant's first witness had also been examined, it did not preclude the defendant from filing the said application. The issue of bad faith as contended by the plaintiffs did not arise, given that the law allowed such an application to be made. (para 20)

(2) There was no merit in the plaintiffs' contention that the procedure adopted by the defendant was wrong in the sense that the defendant must apply for an order under r. 2 first before seeking the court's direction as to the manner in which the question or issue was to be stated. As to the appropriateness of the application, this court echoed the words in *Dayapi Holdings Sdn Bhd & Anor v. Arab Malaysian Finance Bhd & Anor* where His Lordship had stated that '… the appropriate course to adopt, should any party be of the view that the cause could be disposed of without the need of a normal trial, was to invoke O. 33 r. 2 and r. 5 …' (paras 21 & 22)

(3) As evident from the records, the trial of this matter took place from July 2012 until May 2016 with ten witnesses testifying for the plaintiffs and one for the defendant. The examination of the defendant's witness took more than two years *ie* from January 2014 until May 2016. When the judge decided on encl. 68, the entire matter was disposed of and the parties were spared from the rigmarole of the trial process for the defendant's other witnesses to testify. This court was unable to accept the plaintiffs' submission that the defendant failed to show that the application had resulted in substantial saving of time and expenditure. (paras 23 & 24)

(4) The dispute between the plaintiffs and the defendant arose in 2004 *ie* at the 17th AGM when the profit and loss account for the years 2000, 2001 and 2002 were not accepted by the plaintiffs. At the said AGM, the plaintiffs had also raised the issue of payment of dividends. When the plaintiffs raised the complaints in respect of the profit and loss accounts and the dividends in the 17th AGM held on 24 May 2004, that was the earliest time at which an action could be brought against the defendant. As such, the plaintiffs' cause of action which was founded on a breach of agreement accrued on 24 May 2004 and it followed that the suit filed in 2011 was barred by limitation. (para 26)

(5) The plaintiffs failed to particularise the facts or allegations of fraud purportedly committed by the defendant. No dates or other specific conduct of the defendant were pleaded to support an action based on fraud. As for legitimate expectation, the doctrine was only applicable to public law matters and not to private law matters. As such, the plaintiffs could not rely on the purported claim premised on fraud and legitimate expectation. The plaintiffs were therefore left with only the cause of action for breach of contract and/or accounts and in this regard, the plaintiffs were clearly out of time in commencing the instant suit. (para 31)

(6) Having disputed or challenged the profit and loss account for the years 2000, 2001 and 2002, at the 17th AGM; having resolved to establish a profit and loss review committee to review the accounts; having established such a committee and having accepted unanimously the profit and loss account for the years 2000 until June 2006 at the 18th AGM, the plaintiffs were estopped from further challenging or disputing the correctness of the profit and loss accounts. The plaintiffs, by the doctrine of estoppel, could not resile from the position they had taken at the 18th AGM. (para 34)

(7) When an oral evidence openly clashes with contemporaneous documentary evidence, it is safer to rely on the contemporaneous documentary evidence. The contemporaneous documents in the form of the minutes of the 17th AGM and the 18th AGM demolished the plaintiffs' case. The plaintiffs' contention that their claim involved disputed facts could not be sustained and there was no need to clarify the issues pertaining to the accounts during trial. The HCJ was therefore correct to dismiss the plaintiffs' claim pursuant to O. 33 r. 2 and r. 5 of the ROC. (paras 35 & 38)

Bahasa Malaysia *Headnotes*

Perayu-perayu ('plaintif-plaintif') adalah bekas peserta-peserta/peneroka-peneroka satu skim, Rancangan Felcra Sg Ara. Mereka memulakan guaman terhadap Felcra Berhad ('defendan') mencabar pada dasarnya akaun-akaun untung dan rugi defendan dan pengagihan dividen-dividen kepada plaintif-plaintif. Plaintif-plaintif menuntut, antara lain, untuk akaun-akaun dan pertanyaan-pertanyaan, pemeriksaan rekod-rekod kewangan defendan dan ganti rugi ditaksirkan. Kes terus ke perbicaraan penuh. Selepas plaintif-plaintif menutup kes mereka dan selepas saksi pertama defendan selesai memberikan testimoni, defendan memfailkan permohonan (lamp. 68) menurut A. 33 k. 2 dan k. 5 Kaedah-Kaedah Mahkamah 2012 ('KKM') untuk penentuan sama ada tuntutan plaintif dilarang had masa dan sama ada plaintif-plaintif diestop daripada memfailkan guaman. Hakim Mahkamah

Tinggi ('HMT') mendapati plaintif-plaintif telah memfailkan guaman ini lebih dari tujuh tahun selepas kausa tindakan terakru dan bahawa plaintif-plaintif diestop daripada mencabar akaun-akaun defendan. Oleh itu, HMT menolak tuntutan plaintif-plaintif. Terkilan, plaintif-plaintif merayu ke mahkamah ini. Plaintif-plaintif menghujahkan (i) permohonan defendan dibuat dengan niat jahat kerana terdapat kelengahan keterlaluan dan defendan ingin mengelak pemeriksaan balas saksi-saksi; (ii) defendan gagal mengguna pakai perintah bawah k. 2 terlebih dahulu sebelum menuntut arahan mahkamah berkenaan cara persoalan atau isu harus dinyatakan; (iii) defendan gagal menunjukkan permohonan akan mengakibatkan penjimatan masa dan perbelanjaan; (iv) A. 33 k. 2 KKM tidak boleh diguna pakai kerana tuntutan plaintif melibatkan fakta-fakta yang dipertikaikan; dan (v) HMT terkhilaf apabila gagal mengambil kira kausa tindakan plaintif-plaintif tidak berdasarkan hanya atas ketepatan akaun-akaun kewangan defendan tetapi juga atas fraud dan atas doktrin jangkaan sah.

Diputuskan (menolak rayuan)
Oleh Tengku Maimun Tuan Mat HMR menyampaikan penghakiman mahkamah:

(1) Keputusan HMT adalah menurut peruntukan-peruntukan A. 33 k. 2 KKM yang dengan jelasnya menyatakan permohonan boleh dibuat sama ada sebelum, semasa atau selepas perbicaraan. Walaupun dalam kes ini perbicaraan telah mara ke peringkat selanjutnya, dengan saksi-saksi plaintif selesai memberikan testimoni dan saksi pertama defendan juga telah diperiksa, ini tidak mengecualikan defendan daripada memfailkan permohonan tersebut. Isu niat jahat seperti yang dihujahkan oleh plaintif-plaintif tidak timbul, memandangkan undang-undang membenarkan permohonan sebegitu dibuat.

(2) Tiada merit dalam hujahan plaintif-plaintif bahawa prosedur yang dipakai oleh defendan salah kerana defendan sepatutnya mengguna pakai perintah bawah k. 2 terlebih dahulu sebelum menuntut arahan mahkamah berkaitan cara persoalan atau isu dinyatakan. Berkenaan kesesuaian permohonan, mahkamah ini mengikut kes *Dayapi Holdings Sdn Bhd & Anor v. Arab Malaysian Finance Bhd & Anor* di mana Yang Arif Hakim telah menyatakan '… haluan yang sesuai untuk digunakan, sekiranya mana-mana pihak berpandangan bahawa kausa boleh dilupuskan tanpa perbicaraan biasa, adalah untuk menggunakan A. 33 k. 2 dan k. 5 …'

(3) Terbukti dalam rekod-rekod, perbicaraan perkara ini berjalan dari Julai 2012 hingga Mei 2016 dengan sepuluh saksi memberikan testimoni untuk plaintif-plaintif dan satu saksi untuk defendan. Pemeriksaan saksi defendan mengambil lebih daripada dua tahun iaitu dari Januari 2014 hingga Mei 2016. Apabila hakim memutuskan lamp. 68, seluruh

perkara itu telah dilupuskan dan pihak-pihak terkecuali daripada perkara remeh proses perbicaraan untuk saksi-saksi defendan yang lain memberi testimoni. Mahkamah ini tidak dapat menerima hujahan plaintif-plaintif bahawa defendan gagal menunjukkan permohonan telah mengakibatkan penjimatan masa dan perbelanjaan.

(4) Pertikaian antara plaintif-plaintif dan defendan timbul pada 2004 iaitu di AGM ke-17 apabila akaun keuntungan dan kerugian untuk tahun-tahun 2000, 2001 dan 2002 tidak diterima oleh plaintif-plaintif. Di AGM tersebut, plaintif-plaintif telah membangkitkan isu bayaran dividen-dividen. Apabila plaintif-plaintif membangkitkan aduan berkenaan akaun-akaun keuntungan dan kerugian dan dividen-dividen di AGM ke-17 yang dikendalikan pada 24 Mei 2004, itu adalah masa yang paling awal tindakan boleh dibawa terhadap defendan. Oleh itu, kausa tindakan plaintif-plaintif yang diasaskan pelanggaran perjanjian terakru pada 24 Mei 2004 dan berikutan itu guaman yang difailkan pada 2011 dihalang oleh had masa.

(5) Plaintif-plaintif gagal menentukan butir-butir dan tuduhan-tuduhan fraud yang dikatakan telah dilakukan oleh defendan. Tiada tarikh atau apa-apa tingkah laku spesifik defendan diplidkan untuk menyokong tindakan berdasarkan fraud. Berkaitan dengan jangkaan sah, doktrin hanya diguna pakai untuk perkara-perkara undang-undang awam dan bukan untuk perkara-perkara undang-undang persendirian. Oleh itu, plaintif-plaintif tidak boleh bergantung pada tuntutan yang berdasarkan fraud dan jangkaah sah. Plaintif-plaintif, dengan itu, hanya ditinggalkan dengan kausa tindakan untuk pelanggaran kontrak dan/atau akaun-akaun dan berhubungan ini, plaintif-plaintif jelas di luar had masa dalam memulakan guaman ini.

(6) Setelah mempertikaikan dan mencabar akaun keuntungan dan kerugian untuk tahun-tahun 2000, 2001 dan 2002, di AGM ke-17; setelah menubuhkan jawatankuasa kajian semula keuntungan dan kerugian untuk menyemak semula akaun-akaun; setelah menubuhkan jawatankuasa tersebut dan menerima sebulat suara akaun-akaun keuntungan dan kerugian untuk tahun 2000 hingga Jun 2006 di AGM ke-18, plaintif-plaintif diestop daripada mencabar atau mempertikaikan lagi kebenaran akaun-akaun keuntungan dan kerugian. Plaintif, melalui doktrin estoppel, tidak boleh membingkas daripada kedudukan yang telah mereka ambil di AGM ke-18.

(7) Apabila keterangan lisan secara terbuka bercanggah dengan keterangan dokumentar semasa, adalah lebih selamat untuk bergantung pada keterangan dokumentar semasa. Dokumen-dokumen semasa dalam bentuk minit AGM ke-17 dan AGM ke-18 menghapuskan kes plaintif-plaintif. Hujahan plaintif-plaintif bahawa tuntutan mereka melibatkan

fakta-fakta yang dipertikaikan tidak boleh dikekalkan dan tiada keperluan untuk menjelaskan isu-isu berkaitan dengan akaun-akaun semasa perbicaraan. Oleh itu, HMT betul apabila menolak tuntutan plaintif-plaintif menurut A. 33 k. 2 dan k. 5 KKM.

Case(s) referred to:

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Credit Corporation (M) Bhd v. Fong Tak Sin [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 SC ***(refd)***

Darahman Ibrahim & Ors v. Majlis Mesyuarat Kerajaan Negeri Perlis & Ors [2008] 4 CLJ 538 CA ***(refd)***

Dayapi Holdings Sdn Bhd & Anor v. Arab Malaysian Finance Bhd & Anor [2009] 1 CLJ 916 HC ***(foll)***

Dominic J Puthucheary v. Jet Age Construction Sdn Bhd & Anor And Another Appeal [1997] 3 CLJ 807 CA ***(dist)***

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

GPQ Sdn Bhd v. Constant View Sdn Bhd [2017] 1 LNS 821 CA ***(refd)***

Krishnan Rajan N Krishnan v. Bank Negara Malaysia & Ors [2003] 1 CLJ 388 HC ***(refd)***

Nasri v. Mesah [1970] 1 LNS 85 FC ***(refd)***

Newacres Sdn Bhd v. Sri Alam Sdn Bhd [1991] 3 CLJ 2781; [1991] 1 CLJ (Rep) 321 SC ***(refd)***

Savant-Asia Sdn Bhd v. Sunway PMI-Pile Construction Sdn Bhd [2008] 1 CLJ 191 CA ***(refd)***

Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***

Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***

Watt or Thomas v. Thomas [1947] AC 484 ***(refd)***

Legislation referred to:

Limitation Act 1953, s. 6(1)(a), (2)
Rules of Court 2012, O. 33 rr. 2, 5, O. 92 r. 4
Rules of the High Court 1980, O. 33 r. 2

For the appellants - Bernard George & Mathews George; M/s Tay, Bernard & Cheong
For the respondent - Helmi Hamzah & Mohd Rosly Khady; M/s Hisham Sobri & Kadir

[Editor's note: Appeal from High Court, Johor Bahru; Civil Suit No: NCVC 23-90-2011 (affirmed.)]

Reported by Suhainah Wahiduddin

JUDGMENT

Tengku Maimun Tuan Mat JCA:

The Facts

[1] The appellants ("the plaintiffs") are former participants/settlers of a scheme known as Rancangan Felcra Sg. Ara, Johor Darul Takzim. They commenced a suit against Felcra Berhad ("the defendant") on 24 May 2011,

challenging in essence, the profit and loss accounts of the defendant and the distribution of dividends to the plaintiffs. The plaintiffs sought *inter alia* for the following reliefs:

(i) Accounts and inquiries;

(ii) Inspection of the defendant's financial records; and

(iii) Damages (to be assessed).

[2] The case proceeded to full trial where ten witnesses for the plaintiffs testified. After the plaintiffs closed their case and after the first witness for the defendant completed his testimony, the defendant filed an application (encl. 68) pursuant to O. 33 r. 2 and r. 5 of the Rules of Court 2012 ("ROC") for the determination of two issues, namely:

(i) whether the plaintiffs' claim was time barred; and

(ii) whether the plaintiffs were estopped from filing the suit by reason that they had accepted the impugned accounts as true and correct.

[3] In support of its application in encl. 68, the defendant through its legal officer, made *inter alia* the following averments:

> 20. Saya menyatakan bahawa Defendan memfailkan Permohonan Defendan ini sekarang kerana:
>
> (a) 10 saksi Plaintif telah memberikan keterangan di dalam perbicaraan penuh dari 18.7.2012 sehingga 18.10.2013;
>
> (b) 1 saksi Defendan telah memberikan keterangan di dalam perbicaraan penuh dari 16.1.2014 sehingga 19.5.2016;
>
> (c) Plaintif-Plaintif telah mengesahkan wujudnya perkara-perkara berikut:
>
> (i) Mesyuarat Agong Felcra Sg. Ara Kali ke-17 diadakan pada 6.5.2004;
>
> (ii) Mesyuarat Agong Felcra Sg. Ara Kali ke 18 diadakan pada 29.8.2006;
>
> (iii) Peserta-peserta Felcra Sg. Ara telah dengan sebulat suara mempertikaikan penyata-penyata P&L termasuk dan tidak terhad kepada pembahagian dividen pada Mesyuarat Agong Felcra Sg. Ara Kali Ke-17; dan
>
> (iv) Peserta-peserta Felcra Sg. Ara telah dengan sebulat suara menerima semua P&L termasuk dan tidak terhad kepada pembahagian dividen semasa Mesyuarat Agong Felcra Sg. Ara Kali Ke-18;
>
> (d) saksi Defendan yang pertama iaitu Encik Khalid Md. Lip yang juga merupakan Ketua Peserta Felcra Sg. Ara juga telah mengesahkan wujudnya perkara-perkara berikut:

(i) Mesyuarat Agong Felcra Sg. Ara Kali Ke-17 diadakan pada 6.5.2004;

(ii) Mesyuarat Agong Felcra Sg. Ara Kali Ke-18 diadakan pada 29.8.2006;

(iii) Peserta-peserta Felcra Sg. Ara telah dengan sebulat suara mempertikaikan penyata-penyata P&L termasuk dan tidak terhad kepada pembahagian dividen pada Mesyuarat Agong Felcra Sg. Ara Kali Ke-17; dan

(iv) Peserta-peserta Felcra Sg. Ara telah dengan sebulat suara menerima semua P&L termasuk dan tidak terhad kepada pembahagian dividen semasa Mesyuarat Agong Felcra Sg. Ara Kali Ke-18;

(e) setelah pengesahan di atas dibuat oleh Plaintif dan Defendan, maka sewajarnya tindakan ini ditolak bagi mengelakkan penyalahgunaan proses Mahkamah secara berterusan oleh Plaintif-Plaintif; dan

(f) penolakan tindakan ini juga akan dapat menjimatkan kos pihak-pihak dan masa semua pihak terutamanya Mahkamah Yang Mulia ini memandangkan tindakan ini sudah berusia 6 tahun semenjak ia difailkan pada 24.5.2011.

[21] Saya menyatakan bahawa faktor-faktor di atas menjusitifikasikan Permohonan Defendan ini.

Findings Of The High Court

[4] The learned judge allowed the defendant's application and in so deciding, His Lordship relied on *Dayapi Holdings Sdn Bhd & Anor v. Arab Malaysian Finance Bhd & Anor* [2009] 1 CLJ 916; [2008] 3 MLRH 328. The learned judge had also referred to the *Malaysian Civil Procedure 2015* vol. 1 which states the following on the application of O. 33 r. 2 and r. 5:

> Advanced stage of trial proceedings: When the proceeding has reached such an advanced stage of the proceeding or had practically reached the trial stage, the appropriate course to adopt, should any party be of view that the cause could be disposed of without the need of a normal trial, is not to invoke Order 14A, but to invoke Order 33 r. 2, r. 3(2) and r. 5 (see *Dayapi Holdings Sdn Bhd & Anor v. Arab-Malaysian Finance Bhd & Anor* [2009] 1 AMR 336; [2009] 7 MLJ 627 at 642). In *Karen Isabel Wilfred v. Dhyana Shila Vasanthan* [2014] AMEJ 0185; [2014] 4 CLJ 737, the court held that the issue of delay is not a crucial matter to consider in an application under Order 33 r. 2 as the provision allows the court to consider the question or issue to be tried before, at or after trial of the cause of matter. The court further held that the pertinent and crucial factor to consider is whether the trial of the preliminary issue will result in a substantial saving of time and expenditure.

[5] Guided by the above authorities, the learned judge held that there were basis in the defendant's application under O. 33 r. 2 and r. 5. His Lordship then proceeded to deal with the issues of limitation and estoppel as follows.

[6] On limitation, the learned judge noted that the plaintiffs had challenged *inter alia* the agreement that they had entered into with the State Government of Johor; the payment of dividends and the defendant's profit and loss accounts. His Lordship found that these complaints were raised by the plaintiffs at the 17th Annual General Meeting of Felcra Sg. Ara ("the 17th AGM") on 6 May 2004.

[7] The learned judge held that the cause of action accrued on 6 May 2004 and that the plaintiffs were barred by limitation under s. 6(1)(a) of the Limitation Act 1953 which provides *inter alia* that an action founded on a contract shall not be brought after the expiration of six years from the date on which the cause of action accrued. The plaintiffs filed the instant suit on 24 May 2011 ie, more than seven years after the cause of action had accrued.

[8] The learned judge further found that the plaintiffs' claim was also premised on the profit and loss accounts of Felcra Berhad Sg. Ara and as such, s. 6(2) of the Limitation Act 1953 applies which similarly provides for a six year limitation period.

[9] On the issue of estoppel, the learned judge found that after the profit and loss account for the years 2000, 2001 and 2002 were unanimously rejected by the plaintiffs, it was resolved at the 17th AGM that a Profit and Loss Review Committee be established to review the correctness of the profit and loss accounts.

[10] His Lordship made a finding that the Profit and Loss Review Committee was in fact established and that at the 18th Annual General Meeting of Felcra Sg. Ara ("the 18th AGM"), the profit and loss account for the years 2000 until June 2006 were unanimously accepted by the plaintiffs. Applying the principles in *Boustead Trading (1985) Sdn Bhd v. Arab Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283; [1995] 1 MLRA 738, the learned judge held that the plaintiffs were estopped from challenging the accounts of Felcra Berhad Sg. Ara.

[11] Having resolved the two issues against the plaintiffs, the learned judge dismissed the plaintiffs' claim with costs. Aggrieved, the plaintiffs appealed to this court. We heard the appeal and had unanimously dismissed the same. We now provide our reasons.

The Appeal

[12] In summary, learned counsel for the plaintiffs submitted that:

(i) the application by the defendant was made in bad faith as there was inordinate delay and that the defendant wanted to avoid cross-examination of its witnesses;

(ii) the defendant has failed to apply for an order under r. 2 first before seeking the court's directions as to the manner in which the question or issue is to be stated;

(iii) the defendant has failed to show that the application would result in a substantial saving of time and expenditure;

(iv) O. 33 r. 2 of the ROC cannot be resorted to as the plaintiffs' claim involved disputed facts; and

(v) the learned judge erred in failing to consider that the plaintiffs' cause of action was not based purely on the veracity of the defendant's financial accounts but also on fraud and on doctrine of legitimate expectation.

[13] In support of his submission, learned counsel for the plaintiffs cited *Dominic J Puthucheary v. Jet Age Construction Sdn Bhd & Another Appeal* [1997] 3 CLJ 807; [1997] 2 MLJ 252; *Savant-Asia Sdn Bhd v. Sunway PMI-Pile Construction Sdn Bhd* [2008] 1 CLJ 191; [2007] 7 MLJ 706; *Krishnan Rajan N Krishnan v. Bank Negara Malaysia & Ors* [2003] 1 CLJ 388; [2003] 1 MLJ 149 and *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [1991] 3 CLJ 2781; [1991] 1 CLJ (Rep) 321; [1991] 3 MLJ 474.

[14] In reply, it was submitted for the defendant that encl. 68 was correctly filed under O. 33 r. 2 and r. 5 and/or under O. 92 r. 4 of the ROC; that based on the authorities, the plaintiffs are time-barred from challenging any accounts prior to 2005; and that based on the plaintiffs' own admission and agreement to accept the financial accounts of Felda Berhad Sg. Ara as correct, the plaintiffs are now estopped from commencing the instant suit.

Our Decision

[15] The principles on appellate intervention are trite, namely that an appellate court has a duty to intervene only where the trial court was plainly wrong or has so fundamentally misdirected itself that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion (see *Watt or Thomas v. Thomas* [1947] AC 484; *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1; *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545; [1995] 3 MLJ 395; *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453).

[16] We had examined the decision of the learned judge with the above principles in mind, and we were not satisfied that His Lordship was plainly wrong in allowing the defendant's application pursuant to O. 33 r. 2 and r. 5 of the ROC.

[17] Order 33 r. 2 of the ROC reads:

> **Time of trial of questions or issues (O. 33 r. 2)**
>
> 2. The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

[18] Whereas O. 33 r. 5 provides:

> **Dismissal of action after decision of preliminary issue (O. 33 r. 5)**
>
> 5. If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such order or give such judgment therein as may be just.

[19] In the instant appeal, the plaintiffs argued that the learned judge ought not to have allowed the defendant's application by reason of the inordinate delay. Having considered the provisions of O. 33 rr. 2 and 5 and the relevant authorities, His Lordship disagreed with the plaintiffs.

[20] The decision of the learned judge was in accord with the provisions of O. 33 r. 2 which expressly state that the application may be made either before, at or after the trial. Despite the fact that in the instant case trial had proceeded at such an advanced stage, with the plaintiffs' witnesses having completed their testimony and the defendant's first witness had also been examined, it did not preclude the defendant from filing the said application. In this regard, the issue of bad faith as contended by the plaintiffs did not arise, given that the law allows such an application to be made.

[21] The plaintiffs contended that the procedure adopted by the defendant was wrong in the sense that the defendant must apply for an order under r. 2 first before seeking the court's direction as to the manner in which the question or issue is to be stated. We found no merits in the plaintiffs' contention. It was clearly indicated in the learned judge's grounds of judgment that he had allowed the defendant to file the application in encl. 68, where His Lordship stated that:

> [8] Pada 24.5.2016 Defendan telah membuat permohonan kepada Mahkamah ini untuk memfailkan Permohonan Defendan. Mahkamah telah membenarkan Defendan untuk memfailkan Permohonan Defendan dan seterusnya menetapkan 16.6.2016 sebagai tarikh pendengaran Permohonan Defendan tersebut.

[22] As to the appropriateness of the application, we echo the words of Mohd Hishamudin Yunus J (as he then was) in *Dayapi Holdings (supra)*, where His Lordship said at p. 933 (CLJ); p. 341 (MLRH):

> In my judgment, when the proceeding has reached such an advanced stage of the proceeding or had practically reached the trial stage, as has happened in the present case, the appropriate course to adopt, should any party be of view that the cause could be disposed of without the need of a normal trial, is not to invoke O. 14A, but to invoke O. 33 r. 2 and r. 5 of the RHC.

[23] Learned counsel for the plaintiffs had submitted that the defendant failed to show that the application has resulted in substantial saving of time and expenditure. We were unable to accept the submission. As evident from the records, the trial of this matter took place from July 2012 until May 2016 with ten witnesses testifying for the plaintiffs and one for the defendant. The examination of the defendant's witness took more than two years ie, from January 2014 until May 2016. In the circumstances, we found no reason to depart from His Lordship's conclusion that:

> (ix) Lagipun Mahkamah amati penolakan tindakan ini dapat menjimatkan kos pihak-pihak dan masa semua pihak memandangkan ia sudah terlampau lama sejak difailkan pada 24.5.2011.

[24] Obviously when the learned judge decided on encl. 68, the entire matter was disposed of and parties were spared from the rigmarole of the trial process for the defendant's other witnesses to testify.

[25] On the issue of limitation, the learned judge found that the plaintiffs' cause of action accrued in May 2005 when the plaintiffs through one Hamzah bin Abu Bakar raised the complaints on *inter alia* the financial statements or the profit and loss account at the 17th AGM held on 24 May 2004. We found no error of law or fact on the part of the learned judge. His finding was supported by the contemporaneous documents in the form of minutes of the 17th AGM, which recorded the following:

> AGENDA 2
>
> UCAPAN KETUA PESERTA
>
> En. Hamzah bin Abu Bakar
>
> …
>
> 2.4 Setelah dikoperatkan beliau mempertikaikan perjanjian Felcra Berhad dengan Kerajaan Negeri, Potongan Felcra Holding, Penyata Hutang (P&L) yang mengelirukan dan perbelanjaan baja yang tinggi.
>
> …
>
> 2.6 Beliau juga mempertikaikan kaedah bayaran dividen bulanan walaupun harga sawit meningkat, peserta masih mendapat dividen kurang dari apa yang dikehendaki.

[26] We agreed with the learned judge that the dispute between the plaintiffs and the defendant arose in 2004 ie, at the 17th AGM when the profit and loss account for the years 2000, 2001 and 2002 were not accepted by the plaintiffs. At the said AGM, the plaintiffs had also raised the issue of payment of dividends. When the plaintiffs raised the complaints in respect of the profit and loss accounts and the dividends in the 17th AGM held on 24 May 2004 that was the earliest time at which an action could be brought against the defendant. As such, the plaintiffs' cause of action which was founded on a breach of agreement accrued on 24 May 2004 and it follows that the suit filed in 2011 was barred by limitation.

[27] In *Nasri v. Mesah* [1970] 1 LNS 85; [1971] 1 MLJ 32, Gill FJ said at p. 34:

> A "cause of action" is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Lord Esher MR in *Read v. Brown*. In *Reeves v. Butche*r Lindley LJ said:
>
> This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v. Garland*, decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought.

[28] Support can also be found in the case of *Credit Corporation (M) Bhd v. Fong Tak Sin* [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 where the Supreme Court said at p. 76:

> … a cause of action is said to have accrued when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed.

[29] In submitting that the learned judge erred in his finding on limitation, the plaintiffs sought to rely on the defendant's letter dated 18 April 2006 to the plaintiffs/participants of Felcra Sg. Ara. The caption of the letter reads: Pengesahan Selesai Hutang Projek Felcra Berhad Sg. Ara I, II & III Pemakluman Kedudukan Kewangan Peserta. The plaintiffs contended that in light of this letter, the plaintiffs' claim was not time barred. We found that the plaintiffs' reliance on the letter dated 18 April 2006 was misconceived and an afterthought as the plaintiffs had not pleaded this letter in their original statement of claim, nor in their amended statement of claim.

[30] The plaintiffs had also submitted that the learned judge erred in failing to consider that the plaintiffs' cause of action was not based purely on the veracity of the defendant's financial accounts but also on fraud and on doctrine of legitimate expectation.

[31] Insofar as fraud was concerned, it is trite that the plaintiffs must plead the particulars of fraud. However, apart from the too general averments made in para. 11 of the amended statement of claim, the plaintiffs failed to particularise the facts or allegations of fraud purportedly committed by the defendant. No dates or other specific conduct(s) of the defendant were pleaded to support an action based on fraud. As for legitimate expectation, the doctrine was only applicable to public law matters and not to private law matters (see *GPQ Sdn Bhd v. Constant View Sdn Bhd* [2017] 1 LNS 821; [2017] 4 MLRA 483. See also *Darahman Ibrahim & Ors v. Majlis Mesyuarat Kerajaan Negeri Perlis & Ors* [2008] 4 CLJ 538; [2008] 1 MLRA 411). As such, the plaintiffs could not rely on the purported claim premised on fraud and legitimate expectation. The plaintiffs were therefore left with only the cause of action for breach of contract and/or accounts and in this regard, the plaintiffs were clearly out of time in commencing the instant suit.

[32] On estoppel, we likewise found no appealable error on the part of the learned judge. Consequent to the issues raised by Hamzah bin Abu Bakar at the 17th AGM, all the participants of Felcra Sg. Ara voted against the passing of the profit and loss account for the years 2000, 2001 and 2002. The unanimous rejection was evident by the following minutes of the 17th AGM:

> AGENDA 8
>
> MEMBENTANGKAN DAN MENERIMA PENYATA P&L 2000, 2001 & 2002 (Pindaan)
>
> 8.1 Pengurus Kawasan telah membentangkan penyata P&L Sg. Ara I, II dan III bagi tahun 2000, 2001 & 2002 (Pindaan). En. Azis bin Abdul Rahman mencadangkan agar penyata tidak diterima dan disokong oleh Hj. Md. Zin bin Sani dengan sebulat suara.

[33] After the unanimous rejection of the profit and loss account for the years 2000, 2001 and 2002, it was resolved at the 17th AGM that a Profit and Loss Review Committee be established to review the accounts. The learned judge's finding as reproduced below was consistent with the minutes of the 17th AGM:

> (i) … Perkara ini diputuskan secara sebulat suara pada 6.5.2004 dan ia direkodkan di dalam Bil. 3 Keputusan Mesyuarat Agong Peserta Felcra Sg. Ara Kali Ke-17 pada 6.5.2004 seperti berikut:
>
> > Mesyuarat Agong dengan sebulat suara dipersetujui oleh peserta yang hadir, sebuah Jawatankuasa Semakan P & L ditubuhkan dengan melibatkan NGO. Jawatankuasa ini mempunyai ahli yang tetap bagi tujuan pemahaman masa [masalah] yang berbangkit dalam P & L.
>
> (ii) "Profit and Loss Review Committee" telah ditubuhkan dan menjalankan tugas-tugas yang diamanahkan.

A (iii) Pada 29.8.2006 Plaintif dan peserta-peserta Felcra Sg. Ara yang lain telah mengadakan Mesyuarat Agong Kali Ke-18 dan bersetuju untuk meluluskan Agenda 8 iaitu menerimapakai P & L 2000, 2001, 2002, 2003, 2004, 2005 dan Jun 2006 di dalam Mesyuarat Agong Kali Ke-18 tersebut. Agenda 8 Minit Mesyuarat Agong Kali Ke-18 merekodkan seperti berikut:

B

Agenda 8

Membentangkan Dan Menerima Penyata P & L 2000, 2001, 2002, 2003, 2004, 2005 dan Jun 2006.

8.1 Pen. Eksekutif Kanan telah membentangkan P & L Sg. Ara I, C II dan III bagi tahun 2000, 2001, 2002, 2003, 2004, 2005 dan Jun 2006. En. Bakahruddin bin Abd. Rahman mencadangkan agar penyata P & L tersebut diterima dan disokong oleh En. Hudzen bin Deni dengan sebulat suara.

(iv) Senarai nama kehadiran Plaintif adalah di no: 47 (Plaintif Ke-4); no: D 102 (Plaintif Ke-3); no: 119 (Plaintif Ke-2) dan no: 163 (Plaintif Pertama) di muka surat 93-96 dalam Eksibit "FB-6" di Afidavit Defendan No: 1.

(v) Jadi berasaskan fakta-fakta yang dinyatakan sebelum ini, maka wajarlah Plaintif ini dihalang ('estopped') daripada mempertikaikan kesahihan mana-mana akaun kewangan Felcra Berhad Sg. Ara E tersebut selaras atau sejajar dengan keputusan Mahkamah Persekutuan di dalam kes *Boustead Trading (1985) Sdn. Bhd. v. Arab Malaysian Merchant Bank Berhad* (1995) 1 MLRA 738 … .

[34] Having disputed or challenged the profit and loss account for the years 2000, 2001 and 2002 at the 17th AGM; having resolved to establish a Profit F and Loss Review Committee to review the accounts; having established such a committee and having accepted the profit and loss account for the years 2000 until June 2006 at the 18th AGM, the plaintiffs, as correctly decided by the learned judge were estopped from further challenging or disputing the correctness of the profit and loss accounts. The plaintiffs, by the doctrine of G estoppel, cannot resile from the position they had taken at the 18th AGM.

[35] It was submitted for the plaintiffs that the minutes of the AGMs were not accurate. Quite apart from the fact that it was too late in the day for the plaintiffs to challenge the minutes, we found no basis for the plaintiffs to mount such a challenge. In any event, it is quite trite that when an oral H evidence openly clashed with contemporaneous documentary evidence, it is safer to rely on the contemporaneous documentary evidence (see *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979] 2 MLJ 229).

I

[36] For completeness, we wish to state that the instant appeal was in sharp contrast with the case of *Dominic Puthucheary (supra)* cited by learned counsel for the plaintiffs. In *Dominic Puthucheary*, the respondents/plaintiffs, claiming as beneficial owners of a piece of land, brought an action against the appellants/defendants for loss and damage as a result of the defendants wrongfully and without reasonable cause caveating the land and for wrongfully and maliciously conspiring to defraud and to injure the first plaintiff. The action was finally set down for trial but prior to the trial date, the defendants applied under O. 33 r. 2 of the Rules of the High Court 1980 to determine certain preliminary issues. The trial judge dismissed the application. On appeal to this court, the decision of the trial judge was affirmed. Abu Mansor JCA said at p. 821 (CLJ); p. 264 (MLJ):

> … we fail to find any error that would justify us, in law, interfering with his decision. We find we are with the respondent in their submission that the appellants have failed to satisfy the court that the application, if allowed, will result in a substantial saving of time and expenditure, and we say that it is true that the several questions or issues raised need to be clarified by evidence and as such cannot be considered to be preliminary points and ordered to be tried as such.

Conclusion

[37] We found no appealable error of law or fact in the findings of the learned judge which were based on the evidence, particularly the contemporaneous documentary evidence. In our judgment, no useful purpose would be served to proceed with the trial when the issues of limitation and estoppel as framed by the defendant would dispose of the entire matter against the plaintiffs, rendering the trial of the plaintiffs' claim wholly unnecessary.

[38] The contemporaneous documents in the form of the minutes of the 17th AGM and the 18th AGM demolished the plaintiffs' case. In view of the contemporaneous documents, the plaintiffs' contention that their claim involved disputed facts cannot be sustained and there was no need to clarify the issues pertaining to the accounts during trial. The learned judge was therefore correct to dismiss the plaintiffs' claim pursuant to O. 33 r. 2 and r. 5 of the ROC. In the circumstances, we unanimously dismissed the appeal with no order as to costs. The order of the learned judge was affirmed.